APPEAL NO. 950218

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 13, 1995, a contested case hearing was held in (city), Texas, (hearing officer) presiding. The issues from the benefit review conference (BRC) and agreed upon by the parties were:

1.Is the Claimant's left eye glaucoma condition a result of the compensable injury sustained on (date of injury)?

2.Did the Carrier waive the right to contest the compensability of Claimant's left eye glaucoma condition by not contesting compensability within 60 days of being notified of the injury?

The hearing officer determined that respondent's (claimant) left eye glaucoma was a result of a compensable (date of injury), injury and that the appellant (carrier) had waived the right to contest compensability by failing to contest compensability within 60 days of being notified of the injury.

Carrier contends the hearing officer misapplied the facts, the law and the argument by requiring carrier to file a new "TWCC-21 [Payment of Compensation or Notice of Refused or Disputed Claim] upon the receipt of each and every medical report. . . ." Carrier also contends the glaucoma condition was not related to the compensable (month year) eye injury and requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responded that the decision is supported by the evidence and, in essence, requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed in part, and we reverse and render in part, as discussed below.

Initially, we note that claimant testified through a translator and many of his answers were not responsive to the questions asked. We also believe the testimony clearly indicated that claimant did not understand medical terminology and possibly did not know the difference between glaucoma and cataracts. The hearing officer, in her discussion, remarked that "the claimant to be confused as to the cause of his glaucoma condition. . . ." and made findings contrary to claimant's testimony.

The parties stipulated, and it is not disputed, that claimant sustained a compensable left eye injury on (date of injury), when a weed eater he was operating in the course and scope of his employment "threw an object into his left eye." Claimant was treated for his injury by (Dr. S), an ophthalmologist, who returned claimant to work in late November or early December 1991. Claimant testified that he was released at that time with instructions to return if he had any further problems. Claimant apparently worked for the next two years but said that in January 1994 he attempted to make an appointment with Dr. S because of

left eye problems. Claimant finally was able to see Dr. S in March 1994, and according to claimant, Dr. S told him that the problems with his left eye were caused by his 1991 injury. Claimant testified that he had cataract surgery in October 1994. Claimant testified, both on direct examination and in response to the hearing officer's questions, that he thought the cataract condition (not at issue in this case) was caused by the 1991 injury but not the glaucoma condition. It is in this testimony that the hearing officer stated she believed "the claimant to be confused." We do not disagree.

The medical evidence includes a progress note, apparently dated (date of injury), giving a diagnosis of "Hyphema w/ SCH OS (work related) Secondary Glaucoma (not work related)." In a typed report dated November 7, 1991, Dr. S stated:

> On examination the visual acuity without correction was 20/40 in the right eye and hand motion in the left eye. Significant findings were related to the injured left eye.
>
> Thus, [claimant] has suffered a work related injury with a hyphema and secondary glaucoma. He was placed at bed rest at home. . . . He may not work until the hyphema has resolved.

In a report dated November 12, 1991, Dr. S stated that he had reexamined claimant on November 7th and again on November 11th. Dr. S goes on to say "the micro-hyphema has cleared . . . and . . . the subconjnctival [sic] hemorrhage likewise is resolving in the left eye." Dr. S comments:

> His ultimate visual acuity will be no better than 20/400, <u>but this does not relate to the accident</u>. (Emphasis added.)

* * * * *

There should be no further compensable injury from the work related accident.

In a November 15, 1991, report Dr. S stated that claimant's visual acuity remains the same, inflammation has "almost totally subsided," that claimant could return to work and should continue medication for seven to 10 days.

In a progress note, apparently dated March 17, 1994, Dr. S gave a brief recitation of claimant's history going back to 1974 and stated, regarding the left eye, ". . . the loss of vision over the interim was not due to the injury but due to secondary glaucoma which continued to progress out of control." But in a typed report dated March 21, 1994, Dr. S stated:

> [Claimant] suffered a work related injury in the left eye. Prior to that time in 1974, secondary glaucoma was diagnosed and treated with a Scheie filtering

procedure in the left eye. In 1976, when he was lost to follow up the visual acuity was 20/15 in the right eye and 20/20 in the left eye.

From the date of the injury forward the visual acuity has been hand motion in the injured left eye.

I feel that although secondary glaucoma was present previously it was adequately controlled with a Scheie filtering procedure in the seventies. Since the injury the vision has fallen to hand motion in the injured left eye. This is related to the trauma in 1991. A cataract extraction with intraocular lens implant combined with a trabeculectomy is now necessary to preserve what vision is present in the left eye.

I feel that this is a work related injury.

The information in the above quoted March 21st letter was sent to carrier in a letter dated April 26, 1994. A date/time stamp would indicate this letter was received by carrier on April 29, 1994. Subsequently, carrier forwarded the claimant's medical records to (Dr. F), a vitreoretinal consultant with a list of questions by letter dated May 6, 1994.[1] Dr. F in a report dated June 15, 1994, stated:

The patient also has a cataract in the left eye and it is not an unreasonable consideration to perform cataract surgery with trabeculectomy in the left eye. However, I do not think that these conditions are related to this injury which occurred in 1991 when a weed eater threw something and hit him in the left eye . . . Rather, it may be due to a long standing history of secondary glaucoma with subsequent development of cataract.

Subsequently carrier's claim representative wrote Dr. S, by letter dated June 24, 1994, with copies to claimant and "TWCC – [city]" as follows:

With the information presently available to us, including your most recent submission of medical records, [carrier] respectfully disputes that the current problems that the above captioned is having is a result of the (date of injury) injury. Therefore, we dispute any further treatment as being reasonable or necessary as related to his injury of (date of injury).

The Texas Workers' Compensation Commission (Commission) file date/time stamp indicates this letter was received by the Commission's (city) field office on November 17, 1994. We would note that the BRC in this case was also held on November 17, 1994. In a memo dated November 10, 1994, Dr. S stated that "[Claimant] continues to

[1] Carrier refused to divulge exactly what the transmittal letter said or the specific questions asked of Dr. F, on the grounds that it was an attorney work product.

suffer from severe glaucoma in the left eye. This relates to the original injury which occurred to his left eye in (month) of (year)."

As previously noted, the hearing officer resolved both issues in claimant's favor. On the issue of carrier's waiver of its right to contest compensability carrier argues it is not, and should not be "required to formally file a TWCC-21 in order to contest the relationship between the Claimant's original injury . . . where it is not contesting the compensability of the Claimant's original injury, but rather, is contesting either the relationship of the original injury to a subsequent diagnosis. . . ." Carrier seeks to distinguish Texas Workers' Compensation Commission Appeal No. 94798, decided July 26, 1994, cited by the hearing officer.

Section 409.021(c) states:

> If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability.

Further, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(a) (Rule 124.6(a)) requires a notice of refused or disputed claim be "on a form TWCC-21 and in the manner prescribed by the commission." Rule 124.6(c) provides that the TWCC-21 must be filed "on or before the 60th day after the carrier received written notice of the injury. . . ."

Carrier received Dr. S's letter dated April 26, 1994, discussing claimant's history of glaucoma, his 1991 injury and relating the glaucoma "to the trauma in 1991" on or about April 29th. In that letter Dr. S stated "I feel this is a work related injury." Carrier then sent the medical records to Dr. F and asked his opinion on causation and after receiving it wrote Dr. S, on June 24, 1994, that it disputes claimant's "current problems" are the result of the (month year) injury. Carrier has never filed a TWCC-21 and the June 24, 1994, letter to Dr. S was not filed with the Commission until November 17, 1994, almost seven months after it received notice that claimant was alleging the glaucoma he had was related to the (month year) injury. In Texas Workers' Compensation Commission Appeal No. 93198, decided April 22, 1993, a case where back and abdominal injuries were claimed after the initial rib injury, an unpublished decision which has nonetheless been cited a number of times, the Appeals Panel stated:

> We can not read Article 8308-5.21 (since codified as Sections 409.021 and 409.022) to provide that a carrier need not contest such additional or follow-on injuries within 60 days once on notice of such injuries and that it can contest the compensability of such additional or follow-on injuries at any time into the indefinite future.

Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993, cites Appeal No. 93198 and Texas Workers' Compensation Commission Appeal No. 92437, decided September 28, 1992, as being dispositive of the need to contest additional injuries

or follow-on injuries within 60 days of receiving written notice of those injuries. Appeal No. 93491 also involved a situation where an eye abrasion was reported in a medical report after compensation for head and stomach injuries had been commenced. The Appeals Panel held:

> Dr. MA specifically advised the carrier that the claimant was wearing contacts at work, that it was likely that the contacts became infected with chemicals at work, and that the infected contacts could have caused the claimant's eye infections. We believe that this was sufficient notice to the carrier that the claimant was attributing her eye abrasions and infections which are not mere symptoms, to her alleged work-related injury. Yet, the carrier did not ever file a TWCC-21 to dispute the compensability of the claimant's eye injury. The claimant's eye injury is an additional injury from the alleged work-related injury of December 5, 1991, and the carrier should have disputed it within 60 days of notice, but did not.

In Texas Workers' Compensation Commission Appeal No. 950181, decided March 20, 1995, the Appeals Panel affirmed a hearing officer's determination that carrier must dispute a low back injury diagnosed two years after claimant had received a compensable ankle injury. In that case the "written notice" to carrier by the treating doctor was not as clear as this case. Carrier further argues that Rule 124.6(c) "is the applicable statute" (actually rule) as it applies in cases where benefits have already begun. We do not disagree. That rule states:

> (c)If a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim, [the title of the form TWCC-21] on or before the 60th day after the carrier received written notice of the injury. . . . This notice shall contain all the information listed in subsection (a) of this section, provided that all facts set forth as grounds for contesting compensability shall be based on actual investigation of the claim, and shall describe in sufficient detail the facts resulting from the investigation that support the carrier's position.

We note that in Texas Workers' Compensation Commission Appeal No. 94943, decided August 31, 1994, that the Appeals Panel held that where the carrier has accepted that a certain body part was injured (in this case injury to the left eye by the weed eater throw) and medical evidence is developed at a later date indicating the presence of additional physical damage to the same part of the body (Dr. S's report stating claimant's glaucoma was work connected), it would appear that it is the "reopening/new evidence" provision (Section 409.021(d)) which would apply. Regardless of whether claimant's allegation that his glaucoma was caused by the (month year) injury is construed to be notice of a new injury or is only a reopening based on new evidence, carrier has an obligation to timely controvert such allegations with the Commission. Carrier has never filed a TWCC-21 and carrier's June 24th letter was not filed with the Commission until November 17, 1994. We further note, in the instant case that carrier acted on Dr. S's April 26th letter by requesting a consult by their expert, and having received it only advised Dr. S that it disputes the "current problems" as being reasonable and necessary. We believe under the established precedent carrier was also required to contest compensability, preferably on a TWCC-21, with the Commission. Consequently, we affirm the hearing officer's determinations on this point.

Turning to the second issue of whether claimant's left eye glaucoma is a result of the compensable (month year) injury, carrier argues the facts and credibility to be given the doctors' various reports. We agree that the question of whether glaucoma can be induced by trauma, and whether in this particular case the clearly pre-existing glaucoma was in some way aggravated by trauma are complex medical questions clearly beyond the claimant to explain. In fact both the hearing officer and the carrier comment that the claimant was confused about the diagnosis and appeared unable to distinguish between glaucoma and cataracts. We start with the proposition that the claimant has the burden of proving that his current glaucoma was related to, or caused by the (month year) compensable injury. Martinez v. Travelers Insurance Co., 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ). Frequently such causation can be established based on the claimant's testimony alone, even where it is contradicted by medical experts. *See* Houston General Insurance Co. v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). As an exception to the general rules, as recited in Pegues, expert testimony or evidence is required when the matter is such that the fact finder is unable to form an opinion based on the evidence as a whole aided by one's own experience and knowledge. The court in Pegues gave as examples "the cause, progression and aggravation of disease, and particularly of cancer. . . ." *Id* at 495. We believe this case, involving whether glaucoma can be caused or aggravated by trauma, to be of such a type that "only the testimony [or evidence] of experts skilled in that subject has any probative value. [Citations omitted.]" In this case, Dr. S initially stated in his (date of injury), progress note that the secondary glaucoma was "not work related." In a November 12, 1991, note Dr. S states that there "should be no further compensable injury" knowing claimant had a secondary glaucoma condition. Even as recently as a March 17, 1994, progress note Dr. S states claimant's loss of vision "was not due to the injury but due to secondary glaucoma which continued to progress out of control." This position is supported by Dr. F's report which attributes claimant's problems to "a long standing history of secondary glaucoma." Subsequently, Dr. S makes a

statement that "Although secondary glaucoma was present . . . since the injury . . . vision has fallen . . . related to the trauma in 1991." Dr. S makes several conclusory and contradictory statements that the glaucoma is work related without indicating the mechanics or process how that occurred or what caused his apparently conflicting opinions. It was claimant's burden to show how the injury caused his glaucoma, which all the medical evidence indicates was pre-existing to 1974. Claimant was required to establish by a "reasonable probability" the causal connection between his injury and his current glaucoma condition. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199, 202 (Tex. 1980). The Supreme Court in Schaefer stated that although an expert need not use the "magic" words "reasonable medical probability," in the absence of such reasonable probability," the inference of causation amounts to no more than conjecture or speculation." *Id* at 202. In light of Dr. S's earlier notes, indicating the pre-existing glaucoma was not work related, Dr. F's report, and the subsequent statements that it was "work related" without explanation of the process or explanation of his own earlier comments, we believe that Dr. S's conclusory remarks that claimant's glaucoma was work related, under these circumstances, amounts to no more than conjecture or speculation. Consequently we find that as a matter of law the claimant has failed to establish by a preponderance of the expert medical evidence a causation between his secondary glaucoma and his original injury and we reverse the hearing officer's determination on that point. We render a new decision that claimant has failed to establish, by expert medical evidence, that his left eye glaucoma was the result of the compensable injury he sustained in (month year).

Upon review of the record, we affirm the hearing officer's determination that the carrier waived its right to contest the compensability of the glaucoma within 60 days of being notified that claimant was alleging the glaucoma was work related. We reverse the hearing officer's decision that the left eye glaucoma was a result of claimant's (month year) compensable injury and render a new decision that claimant failed in his burden of proving by expert medical evidence that the (month year) injury caused his secondary glaucoma. We, however, affirm the hearing officer's order requiring carrier to pay appropriate income and medical benefits.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge